Introduction

Vanity of vanities, saith the preacher; all is vanity.
And moreover, because the preacher was wise, he still taught the people knowledge; yea, he gave good heed, and sought out, and set in order many proverbs.
The preacher sought to find out acceptable words: and that which was written was upright, even words of truth.
The words of the wise are as goads, and as nails fastened by the masters of assemblies, which are given from one shepherd.
And further, by these, my son be admonished: of making many books there is no end; and much study is a weariness of the flesh.

—Ecclesiastes, 12:8–12

IN 1946, GROUCHO Marx received a letter from the legal department of Warner Brothers studios. The letter warned Marx that his next film project, A Night in Casablanca, might encroach on the Warners’ rights to their 1942 film Casablanca. The letter prompted a reply from Marx that ridiculed many of the operational principles of rights protection in the film industry. First, Marx expressed surprise that the Warner Brothers could own something called “Casablanca” when the name had for centuries been firmly attached to the Moroccan city. Marx declared that he had recently discovered that in 1471 Ferdinand Balboa Warner, the great-grandfather of the Warners, had stumbled upon the North African city while searching for a shortcut to Burbank. Then Marx pondered how the filmgoing audience could possibly confuse the Marx Brothers project with the widely successful Warner Brothers production. American filmgoers, Marx argued, could probably distinguish between Casablanca star Ingrid Bergman and his blond brother Harpo Marx. “I don’t know whether I could [tell the difference],” Marx added, “but I certainly would like to try.”

1
Then Marx turned the issue of name ownership on the Warners. He conceded that they could claim control of “Warner,” but certainly not “brothers.” Marx claimed, “Professionally, we were brothers long before you were.” Marx pointed out that even before the Marx Brothers, there were the Smith Brothers, the Brothers Karamazov, Detroit Tigers outfielder Dan Brothers, and “Brother, Can You Spare a Dime?” which Marx asserted was originally plural, “but this was spreading a dime pretty thin, so they threw out one brother.” Marx asked Jack Warner if he was the first “Jack,” citing Jack the Ripper as a possible precursor. Marx told Harry Warner that he had known several Harrys in his life, so Harry Warner might have to relinquish his title as well. Marx concluded his letter with a call for solidarity among “brothers” in the face of attacks from ambitious young lawyers who might seek to curb their creative activities. “We are all brothers under the skin and we’ll remain friends till the last reel of ‘A Night in Casablanca’ goes tumbling over the spool.”

The Warner Brothers legal department wrote back to Marx several times, asking for a summary of the plot of *A Night in Casablanca* so the lawyers could search for any similarities that might be actionable. Marx replied with a ridiculous plot summary about brother Chico Marx living in a small Grecian urn on the outskirts of the city. The legal department again wrote for more detail. Marx answered by saying he had substantially changed the plot of the film. The new story involved Groucho Marx playing a character named Bordello, the sweetheart of Humphrey Bogart, and Chico running an ostrich farm. Marx received no more letters of inquiry from the Warner Brothers legal department.

In his responses to the Warner Brothers legal department, Marx made several points about mid-century trends in “intellectual property.” These trends have grown more acute in the last decade and presently threaten creativity and access to information. American copyright law at the beginning of the century tilted in favor of consumers at the expense of producers. In an attempt to redress that antiproducer imbalance, courts, the U.S. Congress, and international organizations have succeeded in tilting the body of law dangerously the other way. Groucho Marx is gone, but AOL Time Warner, Inc., is more powerful than ever.

Since the release of *A Night in Casablanca*, information, entertainment, and computer software have emerged as among the United States’ most valuable resources and most profitable exports. Yet the legal system that supports and guides those resources, “intellectual
property law,” remains the murkiest and least understood aspect of American life and commerce. The rules seem to change every few years, yet remain a step behind the latest cultural or technological advances. Ignorance of the laws and fear of stepping over gray lines intimidate many artists, musicians, authors, and publishers. Meanwhile, copyright libertarians flaunt the difficulty of enforcement over the nation’s computer networks, and rap musicians lift samples of other people’s music to weave new montages of sound that have found a vibrant market. In recent years, the following phenomena have complicated the discussion over what sorts of “borrowing” and “copying” are allowed or forbidden under intellectual property standards:

- Rap stars 2 Live Crew parodied Roy Orbison’s song “Oh, Pretty Woman.” Orbison’s licensing company, Acuff-Rose, sued the rap group, alleging that the new recording was not a true parody and thus was not protected by the “fair use” provision of the copyright law.
- In an airport, artist Jeff Koons spotted a picture postcard of a suburban couple hugging a litter of puppies. He instructed his understudies to build a sculpture of the couple and paint them ridiculous colors. Koons sold the sculpture to a museum, but the photographer sued him for copyright infringement and won. The photographer now has possession of the sculpture as part of the settlement.
- The U.S. government has pressured the Chinese government to crack down on publishers and vendors who issue unauthorized versions of American music, literature, and computer software.
- Motion picture companies in the 1970s urged the U.S. Congress to restrict the sale of video cassette recorders in the United States, fearing that duplication of films would limit first-run movie profits. After losing the antivideo battle in Congress and in the courts, the industry embraced the technology and opened up a whole new sector for redistributing its products. Then, in 2000, the industry again lowered heavy legislative and legal hammers to stifle a technology that allows unauthorized private, noncommercial access to and copying of digital video discs.
- Record companies in the 1980s stalled the introduction of digital audio taping equipment into the consumer market, fearing high-quality home musical copying would limit compact disc sales.
Then, in the spring of 2000, the recording industry initiated a slew of legal actions to restrict the proliferation of file-sharing services such as Napster, through which fans can share compressed music files.

- Apple Computer Corporation unsuccessfully sued Microsoft Corporation for copyright infringement. Apple accused the software giant of illegally basing its Windows format on Apple’s Macintosh graphical user interface design.

All of these issues go deeper than the tangle of statutes and court decisions that weave the mesh of copyright law. They expose and depend on American ethical assumptions and cultural habits, including the notions of rewarding hard work, recognizing genius and creativity, ensuring wide and easy access to information, and encouraging experimentation in both art and commerce. More deeply, these issues raise questions about whether American culture, with its African American and American oral traditions and anti-authoritarian predispositions, can broadly deploy a legal framework drawn up by British noblemen three centuries ago. As American expressive culture becomes more technologically democratic, more overtly African American, more global and commercial, the archaic legal system it inherited has been remarkably able to accommodate all these changes, however imperfectly. The story of copyright law in the twentieth century has been the process of expanding, lengthening, and strengthening the ill-fitting law to accommodate these changes. Gradually the law has lost sight of its original charge: to encourage creativity, science, and democracy. Instead, the law now protects the producers and taxes consumers. It rewards works already created and limits works yet to be created. The law has lost its mission, and the American people have lost control of it.4

WHO IS COPYRIGHT FOR?

As a result of these and other cases, digital reproduction, international commerce, and digital music sampling have exposed gaps in the law’s ability to deal with new forms of production and new technologies. Powerful interests have argued for stronger restrictions that intimidate artists, musicians, and computer hobbyists into respecting “property rights” at the expense of creative liberty. Others have abandoned all
hope of legally constraining piracy and sampling, and have instead advocated a system of electronic locks and gates that would restrict access to only those who agree to follow certain strict guidelines.

This book argues against both those positions. Through a series of case studies in different media through the twentieth century, it argues for “thin” copyright protection: just strong enough to encourage and reward aspiring artists, writers, musicians, and entrepreneurs, yet porous enough to allow full and rich democratic speech and the free flow of information. The book opens with an examination of Mark Twain’s role in defining the terms of debate for literary copyright in the first decade of the century. It will then show how some key Supreme Court decisions brought the new media of film and recorded music under the copyright umbrella, poking a hole in the wall that separated the protection of specific expression and the freedom to use others’ ideas. The experiences of jazz and blues composers flesh out the complexities of how the law handles “works made for hire” and the ethnic politics at work in issues of ownership and control of American popular music. The book will then use rap music to explore how postmodern sensibilities and new technologies have exposed deep flaws in the law. Finally, it will examine some disturbing trends in international “intellectual property” law that may fundamentally change how American literature, music, film, software, and information will be produced, bought, sold, and used in the twenty-first century.

The chief goal of this work is to explain how essential the original foundations of American copyright law are to our educational, political, artistic, and literary culture. Lately, as a result of schools of legal thought that aim to protect “property” at all costs and see nothing good about “public goods,” copyright has developed as a way to reward the haves: the successful composer, the widely read author, the multinational film company. Copyright should not be meant for Rupert Murdoch, Michael Eisner, and Bill Gates at the expense of the rest of us. Copyright should be for students, teachers, readers, library patrons, researchers, freelance writers, emerging musicians, and experimental artists. Because the body of law has grown so opaque and unpredictable in recent years, copyright policy discussion has resided in the domain of experts who have the time and money to devote to understanding and manipulating the law. Copyright myths have had as much power as copyright laws. The interests of the general public have been ignored by the movements to expand copyright in the 1990s. Organizations of
librarians and scientists have taken stands against odious policy proposals, but they are matched against lawyers for Microsoft and Disney. It is not a fair fight. My prescription for this problem is to bring the discussion of copyright issues into the public sphere, where it once was.

As literary historian Michael Warner explains in his book *The Letters of the Republic*, the idea of a public sphere was central to early American republican ideology, the same ideology that produced and justified American copyright law. The emergence of an independent press culture enabled the development of a public sphere and allowed those who were sanctioned to participate in it (literate white males) to simultaneously criticize the state and commercial culture. Not coincidentally, Warner argues, late-eighteenth-century American print culture was the site of shifting and emerging definitions of terms such as “individual,” “print,” “public,” and “reason.” All of these terms lend themselves to the foundations of American copyright law. So this project builds upon Warner’s: the eighteenth-century public sphere was essential to the establishment of copyright law, and copyright’s subsequent transformations coincide with the general structural transformation of the public sphere. A cycle has developed. The corruptions of copyright have enforced, and been enforced by, the erosions of the public sphere.

Five decades before Jürgen Habermas described the structural transformation of the public sphere in the twentieth century, Walter Lippmann and John Dewey sensed these changes as well. They each prescribed different and opposing treatments for what ailed—and still ails—American society. In *Public Opinion* (1922), Lippmann described the failure of the liberal republican model of communication. He argued that the world in the twentieth century had grown so complex and diffuse, and questions of public concern required so much specialized knowledge, that the general public was unable to deal with issues intelligently or efficiently. Mass communications by the 1920s had ceased operating as the site of dependable or substantial information about the world. Instead, Lippmann asserted, all that most readers could discern from the mass media was a series of confusing “stereotypes,” fuzzy and distorted “pictures in our heads.” Lippmann believed that “true,” dependable, and useful information was fixable and usable, but only if a class of experts could filter, edit, and certify the information first. This priestly class of educated experts, Lippmann argued, should have a central role in all discussions and decisions of public policy. It should guide, if not determine, public opinion. In other words, Lippmann
sensed that the republican public sphere had eroded. He argued that an elite state council could replace it. Lippmann wanted to shift the duties of the public sphere to the state itself.7

John Dewey reviewed Lippmann’s Public Opinion in the New Republic in 1922. Five years later, Dewey assembled a broad indictment of Lippmann’s ideas in the book The Public and Its Problems (1927). Recognizing that such a council of Brahmin experts would threaten real democracy, Dewey instead called for a reinvigoration of local public spheres. The public should be better educated to be able to distinguish between solid description and mere stereotypes, Dewey argued, and a broader cross-section of the public must be included in the public sphere. “We lie, as Emerson said, in the lap of an immense intelligence,” Dewey wrote. “But that intelligence is dormant and its communications are broken, inarticulate and faint until it possesses the local community as its medium.”8

Alas, Dewey lost the battle. American political culture since Lippmann’s Public Opinion has been marked by steady centralization and corporatization of information and access. Experts have simultaneously assumed control of the information necessary for decision making and increased their influence over the means of exercising power. While the electorate has structurally expanded through civil rights legislation, potential voters protest their disconnection from the process of decision making by recusing themselves. Occasionally, technological innovations such as the Internet threaten to democratize access to and use of information. However, governments and corporations—often through the expansion of copyright law—have quickly worked to correct such trends. Therefore, considering copyright issues as a function of the failure of the public sphere simultaneously reveals the poverty of the public sphere and the ways in which a healthy public sphere would depend on “thin” copyright policy.

Copyright policy is set through complex interactions among a variety of institutions. International organizations, federal agencies, Congress, state legislatures, law journals, private sector contracts, and the habits of writers, artists, and musicians all influence the operation of the copyright system. Often these forums operate without sufficient understanding of the “big picture” of the copyright system: its role, purpose, and scope. Seldom are copyright issues adequately examined through the instruments that might contribute to a healthy public sphere—magazines, newspapers, and popular books.
There is no “left” or “right” in debates over copyright. There are those who favor “thick” protection and those who prefer “thin.” At the extreme margins there are property fundamentalists and there are libertarians. Some believe that copyright is an artificial and harmful monopoly that should be destroyed or at least ignored. There are those who consider copyright a natural right, one that morally derives from the very act of imagining and creating. Others believe copyright should adhere to a “labor” theory of value: investing effort and adding value to a previous work or set of data should generate legal protection. And some others adhere to the position argued in this book: copyright is the result of a wise utilitarian bargain, and it exists to encourage the investment of time and money in works that might not otherwise find adequate reward in a completely free market. There are costs and benefits, winners and losers in every policy act. Examining these costs and benefits, and publicly debating them, can yield a more just and efficient copyright system, and possibly a more dynamic culture and democracy.

SHIFTING THE FOCUS

This book has another mission: to shift the terms of discussion about copyright in scholarly circles from the theoretical to the empirical. In other words, I want to move the debate away from such metaphysical concepts as whether an autonomous “author” exists, whether such a being could produce a stable “text” or “work,” and whether that text could be in any measurable way “original.” These are all interesting questions, but they are questions that can fade from significance if we consider actual incidents of human beings creating, labeling, and selling books, songs, or sculptures. As we can see from examining the products we associate with Mark Twain, Willie Dixon, and Bill Gates, “authorship” is theoretically suspect, texts are unstable and determined in large part by their readers, and originality is more often a pose or pretense than a definable aspect of a work. Scholars such as Cathy Davidson, Martha Woodmansee, Mark Rose, Peter Jaszi, and David Sanjek have shown us that the questions Roland Barthes and Michel Foucault raised about our western notions of authorship are powerful and important. Yet raising these questions is not sufficient. There is much more work to be done.9

For most people and in most usages, an “author” is an obvious
concept. An author is a person who writes something. If prompted, many people will elaborate on the notion by differentiating a “creative” author from a mere transcriber. This distinction carries with it a sense of cultural hierarchy, with the creator on the north side of the equation. As we will discover later in this work, the distinction yields legal and commercial differences as well. But these common definitions and distinctions have come under severe scrutiny by philosophers and literary theorists.

French literary theorist Roland Barthes, in a 1968 essay called “The Death of the Author,” opened a line of exploration that means to understand how European and American literary culture has arrived at its common definitions and system of rewards for an author. Barthes wrote his essay to urge a shift in critical attention away from the human being who readers imagine stands above the action of a work, tugging on narrative marionette strings. Barthes defined this imagined “author” as the sum of the assumptions of psychological consistency, meaning, and unity that readers and critics had traditionally imposed on a text. Counter to the traditional understanding of authorship, Barthes called for a different way of understanding the process of reading: as a game played entirely by the reader. The reader or critic, not the author, produces the meaning of the text, Barthes argued. By taking the historical or biographical author out of the search for meaning in a text—by killing the author—Barthes empowered the reader within the environment of textuality.10

In response to Barthes, philosopher Michel Foucault redefined—and thus revived—the author as a relevant, if not imperative, function of reading, criticism, and literary analysis. To do this, Foucault imagined a culture in which the idea of an “author” would be dead. Foucault noted that without a legal definition of an “author,” the language of critical discourse would lack its operational vocabulary and habits of analysis. Without a name to attach to a work, no one could be held accountable for the content and ramifications of the work. Foucault’s author, one who could be held accountable, is a legally prescribed and described entity, not necessarily a flesh-and-blood human being, and certainly not exclusively a brooding romantic “genius,” toiling in darkness and channeling a muse. An author is not just a “writer” for Foucault. Graffiti on a bathroom wall has a writer, Foucault noted, but not an author. The law and thus the culture use the idea of an “author,” even if it is merely a proper name, as a locus for a complex network of activities.
and judgments that deal with ownership, power, knowledge, expertise, constraints, obligations, penalties, and retribution. Foucault defined the author as a legal and cultural function, but one that matters deeply to how a culture understands, uses, and is manipulated by texts. So for Foucault, the author matters. But it matters for what it does in a culture, not necessarily whom it represents. This depersonalized “author-function” has four traits. It is linked to the legal system that regulates discourse within a culture. It operates differently in different cultures. An “author” does not precede a “work” (much as for Jean-Paul Sartre’s human being, essence does not precede existence), but comes into being only as it functions in a legal and cultural environment. Lastly, it represents not simply an actual identifiable human being but perhaps several independent, contradictory, or conflicting identities.11

What do we do about “authorship” once we have labeled it “constructed”? How does such a label help us build a more democratic system for the exchange of cultural production? How does it help us encourage new and emerging artists and musicians against the overwhelming force of companies like Microsoft, Time Warner, and Walt Disney? We can deconstruct the author for six more decades and still fail to prevent the impending concentration of the content, ownership, control, and delivery of literature, music, and data. As law professor Mark Lemley has argued, attacking the bogeyman of “romantic authorship” is misguided because romantic authorship neither explains many of the most important changes in copyright law over the past two hundred years nor prescribes a way to improve the ways copyright law works.12

A seventeen-year-old mixing rap music in her garage does not care whether the romantic author is dead or alive. She cares whether she is going to get sued if she borrows a three-second string of a long-forgotten disco song. We must get beyond such esoteric discussions about the rise of the romantic author. Instead, we should define an “author” broadly, as a cultural entity: a “producer.” Since 1909, the copyright statute has recognized this broad sense of authorship, the “unromantic” author. The unromantic author might be a young rapper with a $2,000 MIDI sampling machine or a corporation like Disney, through a team of writers working on the cartoon version of Don Quixote. American copyright law itself undermines any romantic sense of individual genius. It recognizes both Microsoft and Miles Davis as authors in a legal sense. The law has changed over the course of the century to create that spe-
cial legal entity that in fact has little or nothing to do with a personified “author” as we traditionally imagine. Still, we must deal with the “producer” in some form, in court if nowhere else.

THE CASE AGAINST “INTELLECTUAL PROPERTY” TALK

From the middle of the nineteenth century, those who have pushed to enlarge and deepen copyright protection have invoked the need to protect authors from “theft.” As we shall see in the chapters to come, some of those claims were warranted, and the U.S. Congress adjusted the laws to deal with these problems. However, since 1909, courts and corporations have exploited public concern for rewarding established authors by steadily limiting the rights of readers, consumers, and emerging artists. All along, the author was deployed as a straw man in the debate. The unrewarded authorial genius was used as a rhetorical distraction that appealed to American romantic individualism. As copyright historian Lyman Ray Patterson has articulated, copyright has in the twentieth century really been about the rights of publishers first, authors second, and the public a distant third. If we continue to skewer this “straw man” of authorship with our dull scholarly bayonets, we will miss the important issues: ownership, control, access, and use.

It is essential to understand that copyright in the American tradition was not meant to be a “property right” as the public generally understands property. It was originally a narrow federal policy that granted a limited trade monopoly in exchange for universal use and access. Lately, however, American courts, periodicals, and public rhetoric seem to have engaged almost exclusively in “property talk” when discussing copyright. The use of “property” as a metaphor when considering copyright questions is not new. The earliest landmark cases in British copyright discuss “the great question of literary property.” And as we will see, Mark Twain invoked property talk to shift the debate away from what was good for America at large to what would benefit successful authors. However, throughout the eighteenth and nineteenth centuries in both England and the United States, property talk was balanced and neutralized by policy talk—a discussion of what is best for society.

The phrase “intellectual property” is fairly young. Mark Lemley writes that the earliest use of the phrase he can find occurs in the title of
the United Nations’ World Intellectual Property Organization, first assembled in 1967. Soon after that, the American Patent Law Association and the American Bar Association Section on Patent, Trademark, and Copyright Law changed their names to incorporate “intellectual property.” Over the past thirty years, the phrase “intellectual property” has entered common usage with some dangerous consequences.  

What happens when all questions of authorship, originality, use, and access to ideas and expressions become framed in the terms of “property rights”? The discussion ends. There is no powerful property argument that can persuade a people concerned about rewarding “starving artists” not to grant the maximum possible protection. How can one argue for “theft”?  

Therefore, we must change the terms of the debate once again. If this book can persuade readers that copyright issues are now more about large corporations limiting access to and use of their products, and less about lonely songwriters snapping their pencil tips under the glare of bare bulbs, maybe it can revive the discussion. Instead of trying to prevent “theft,” we should try to generate a copyright policy that would encourage creative expression without limiting the prospects for future creators. We must seek a balance. Historically and philosophically, “intellectual property” accomplishes neither. The idea and the phrase have been counterproductive. Instead of bolstering “intellectual property,” we should be forging “intellectual policy.”

FROM TWAIN TO 2 LIVE CREW

When and how did “property talk” start dominating American copyright discourse? Public and congressional debates over copyright reform from 1870 through 1909 set the tone for the rest of the twentieth century. Because of the work of Mark Twain and others, “property talk” gained a place in the public imagination. Its power grew steadily after that. Twain lived and wrote at the moment when copyright issues leaped off the printed page and into the atmosphere of sight and sound. At the moment when Twain found reason to applaud the 1909 revision of the copyright law, American culture and technology rendered it outdated once again. The first two decades of the twentieth century saw the invention of phonographs and recording machines. Ragtime composers, who mastered their art through communal creativity and an
emphasis on style, suddenly had to come to terms with the fear that an unprotected work would leave the author without financial reward. These changes made popular expression profitable. From the first two decades of the twentieth century, we see the beginning of the practice that would haunt black musicians for decades: white composers filing for copyright protection on works created out of the commons of African American aesthetic traditions.

During this time, the most influential legal mind of the twentieth century, Justice Oliver Wendell Holmes, almost single-handedly rewrote American copyright law and allowed it to creep into areas for which it was never intended. The habits and structures of these new industries, music and film, almost immediately undermined the integrity and simplicity of the idea/expression dichotomy. As this book shows, these decisions were somewhat out of character for Holmes.

Since the 1830s, copyright law has worked well while it only had to deal with the written word, and when few firms could afford the expense of producing and marketing books. Not coincidentally, the American architects and original interpreters of the law at the time held a strong sense of obligation to a rich public sphere. To understand the ways that copyright law can conflict with and inhibit American cultural expression, we must consider the centrality of orality to American culture, as performed through country and blues-based music and the tall tale. A hundred different people can sing about Stagger Lee or John Henry, but the person who sings it best gets rewarded most. Style matters more than substance in oral cultures. No one raises objections that “Stagger Lee is my song.” Oral traditions that sprout written traditions handle questions of authorship and originality differently than long-time written traditions do. The American oral-written tradition revels in common tradition and chains of influence, and uses them with wit and style. This aesthetic is clearest within African American oral, literary, and musical traditions.

Zora Neale Hurston, in an anthropological essay on African American expression, explained how a fixation on European notions of authorship and originality allowed a misreading of black aesthetics: “The Negro, the world over, is famous as a mimic. But this in no way damages his standing as an original. Mimicry is an art in itself. If it is not, then all art must fall by the same blow that strikes it down.” Hurston explained that what white commentators derided as “mimicry” was actually skillful rendering and repetition. The practice has its
own internal aesthetic sense, its own “originality.” As Hurston wrote, “Moreover, the contention that the Negro imitates from a feeling of inferiority is incorrect. He mimics for the love of it. . . . He does it as the mocking-bird does it, for the love of it, and not because he wishes to be like the one imitated.”

Orally based literatures are likely to be heavily informed by immediate audience response, and the storyteller must react to what has been told before and to what is going on around him. The storyteller has an important role, one of demystified authorship. Yet there is no overriding concern for authorial “originality” as copyright law defines it. As American popular music grew steadily Africanized, authorship grew fuzzier and authorial creativity became more of a legal concept than a cultural one. If the United States adhered strongly to the principle of authorial reward as the sole function of copyright law, every rock-and-roll musician would owe money to Mississippi Delta blues musicians. Instead, we consider the twelve-bar blues to be community property, a valuable commons for all Americans to enjoy.

Concurrent with the triumphs of black expression in the last half of the twentieth century, a technological boom fostered a true democratization of expression. Photocopy machines, cheap cameras, film, video tape, and digital and computer technology have allowed almost any person to distribute a facsimile of almost anything to almost anywhere. This convergence of cultural change and technological liberation has created what cultural theorists have dubbed “the postmodern condition.” Against this background, rap music has grown to dominate American popular culture in the last two decades. It has also rendered copyright law incapable of arbitrating under the old definitions of “author,” “work,” or “originality.” Any person with a series of recorded tracks from old songs can fuse them together with a $2,000 electronic mixer and rap over the bed of other people’s music, creating a new “work” composed by dozens of “authors.” As a result of this ill fit between art and law, no one knew what the guidelines for digital sampling were for the first decade of recorded rap music. Artists, growing fearful of suits from large record companies, tended to sample obscure songs. Licensing fees fluctuated irregularly, and no one could safely predict the penalty for unauthorized sampling. On any given day, a rap artist might have gotten ripped off by an overpriced licensing fee, or a publishing company might have been burned by charging too little for a sample that helped produce a top
hit. After a landmark sampling case in 1991, the practices solidified, but not for the better. The practice of sampling without permission has all but ended. However, this move to protect established songwriters at the expense of emerging ones runs counter to both the intent of copyright law and the best interest of society.

**REDISCOVERING INTELLECTUAL POLICY**

Copyright should be about policy, not property. Many recent trends and changes in copyright laws—including proposals that would protect the content of databases both domestically and internationally—are bad policy. These changes threaten democratic discourse, scholarly research, and the free flow of information. The goal of the entire copyright system should be to recognize the pernicious repercussions of restricting information, yet to reward stylistic innovation. To envision the best possible copyright system—one that would encourage creativity and democracy—we must revise our notion of intellectual “theft.” You cannot “steal” an idea, a style, a “look and feel.” These things are the raw material of the next move in literature, art, politics, or music. And using someone’s idea does not diminish its power. There is no natural scarcity of ideas and information. To enrich democratic speech and foster fertile creativity, we should avoid the rhetorical traps that spring up when we regard copyright as “property” instead of policy. We must also rediscover, reinvent, and strengthen the idea-expression dichotomy. And we will be able to have a more informed public discussion about the purpose and scope of copyright.

This book has three goals. The first is to trace the development of American copyright law through the twentieth century. After examining the principles and history of British and American copyright law, it will proceed to a series of accounts of how copyright law has affected American literature, film, television, and music. The second goal is to succinctly and clearly outline the principles of copyright while describing the alarming erosion of the notion that copyright should protect specific expressions but not the ideas that lie beneath the expressions. The third and most important purpose of this book is to argue that American culture and politics would function better under a system that guarantees “thin” copyright protection—just enough protection to encourage creativity, yet limited so that emerging artists, scholars,
writers, and students can enjoy a rich public domain and broad “fair use” of copyrighted material. While “thick” copyright has had a chilling effect on creativity, thin copyright would enrich American literature, music, art, and democratic culture.

This book is the result of six years of unsystematic intellectual grazing. The questions I ended up answering diverged greatly from the questions I asked six years ago. I started with too many assumptions and too little knowledge. Now I have too many assumptions and too much knowledge. That’s some progress at least.

This is not a legal history. It’s a cultural history of a legal phenomenon. I’ve spent many hours in law libraries, but I’m not a lawyer. My lack of legal training is both a strength and a weakness. I have been free to survey the literature and material without the strictures of legal theory guiding me. I have also been able to view the copyright system as a producer and consumer might, rather than as an arbitrator or advocate would. I did not fear that unconventional views might hinder my legal career, because I have none. However, ignorance is not a very effective tool in scholarship. I would not recommend it. So I made sure to seek guidance from some of the finest legal minds I could find to help me out. An exciting community of legal scholars have argued the public’s case in these debates. Using their work, I have tried to describe a process by which a well-balanced copyright system can encourage new cultural expression and help democracy work better. Or, more precisely, I have criticized an emerging copyright system that increasingly works against those goals. Literature, music, and art are essential elements of our public forums. They are all forms of democratic speech and should be encouraged and rewarded, not chilled with threats of legal action.